

***Office of the Comptroller ex rel. Local 1087
v. Office of Labor Relations***

OATH Index No. 588/10 (June 23, 2010), *modified and remanded*, Comptroller's Interim Order & Determination (Oct. 28, 2010), **appended**

1. ALJ found the duties of the head locksmiths at Columbia University to be comparable to those performed by the City's supervising locksmiths and recommended that the wages and benefits to be paid to the City's supervising locksmiths be commensurate with those set forth in Columbia's collective bargaining agreement with Local 241.
2. ALJ found the duties of Columbia's locksmiths A and of locksmiths at four private sector groups to be comparable to those City locksmiths. Even though no one employee group satisfied the thirty percent threshold requirement under the Labor Law, an aggregate of two groups, including Columbia's locksmiths A, did. In arriving at her recommendation that the wages and benefits for Columbia's locksmith A be applicable to City locksmiths, the ALJ selected the group represented by the predominant union (representing more locksmiths than the only other private sector unionized group), as consistent with the statutory language.
3. The Comptroller adopted the ALJ's findings and recommendation with respect to supervising locksmiths but disagreed that the thirty percent threshold can be reached through aggregation.
4. Instead, the Comptroller finds that the prevailing wage for City locksmiths shall be the average of wages and supplements of the Columbia locksmiths A and the four groups of private sector locksmiths whose duties the ALJ found comparable to City locksmiths.
5. Matter remanded to OATH for establishing the value of wages and supplements received by Columbia's head locksmiths during the relevant period; and, for determining the average rate of wage and supplements for locksmiths during the relevant period, consistent with the Comptroller's modification.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
**COMPTROLLER EX REL. LOCAL 1087,
DISTRICT COUNCIL 37, AFSCME, AFL-CIO**
Petitioner
-against-
OFFICE OF LABOR RELATIONS
Respondent

REPORT AND RECOMMENDATION

INGRID M. ADDISON, *Administrative Law Judge*

Petitioner, the City of New York Office of the Comptroller, brought this proceeding pursuant to section 220(8-d) of the Labor Law, on the complaint of Local 1087, an affiliate of District Council 37, AFSCME, AFL-CIO (“Union” or “Local 1087”). Petitioner seeks a determination of the prevailing wages and supplemental benefits to be paid from July 1, 2002 through December 31, 2009, to locksmiths and supervising locksmiths employed by the City (“complainants”) (ALJ Ex. 1).

Petitioner made a preliminary determination that complainants should be paid commensurate with the wages and supplements set forth in the collective bargaining agreement between the Building Contractors’ Association, Inc. (“BCASS”) and the Transport Workers Union of America Local Union No. 241 (“Local 241”) for the locksmiths at Columbia University (“Columbia”). The Union agrees with this determination. Respondent, the Office of Labor Relations (“OLR”) contends that Local 241 is not the prevailing union because its members do not comprise 30 percent or more of locksmiths in New York City, as prescribed under section 220(5)(a) of the Labor Law. OLR did not put forward a comparable group for the disputed workers.

During a seven-day hearing in January and February, 2010, the parties produced witnesses and documentary evidence.¹ The record closed on May 4, 2010, following the submission of post-trial briefs. The evidence established that four private sector locksmiths (Columbia (2), Highway Locksmiths (1) and Midtown Security (1)) perform work comparable to the City’s supervising locksmiths. The evidence further established that Columbia’s head locksmiths comprise at least thirty percent of the comparable group of supervising locksmiths, and receive a collectively bargained rate of wage under Columbia’s collective bargaining agreement with Local 241. Therefore, pursuant to section 220(5)(a) of the Labor Law, the wages and supplements set forth in Columbia’s collective bargaining agreement for its head locksmiths should be deemed prevailing for the City’s supervising locksmiths.

I also find that thirty-four private sector locksmiths (Columbia (8), Highway Locksmiths (7), Midtown Security (6), AAA Architectural Hardware (9), and Central Lock and Security Systems (4)) perform work comparable to the City’s locksmiths. The evidence established that,

¹ At trial petitioner indicated that it was ready to offer evidence regarding supplemental benefits. I advised the parties that the hearing related to the Comptroller’s determination of the prevailing union only and that the Comptroller could petition for fact-finding related to supplemental benefits after a decision was rendered. *Office of the Comptroller, ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 2451/08 at 3 (Apr. 6, 2009).

in the aggregate, at least thirty percent of the locksmiths performing comparable work receive a collectively bargained rate of wage under Columbia's collective bargaining agreement with Local 241 and Central Lock and Security Systems' collective bargaining agreement with Amalgamated Clothing Workers Local Union No. 348. While independently, neither collective bargaining agreement satisfies the statutory thirty percent threshold, I find that the collective bargaining agreement for the predominant union, that is Local 241, should prevail.

Accordingly, the Comptroller's preliminary determination that complainants be paid wages and supplemental benefits commensurate with those set forth in agreement for locksmiths at Columbia University should be adopted.

BACKGROUND

Statutory Background

Section 220 of the New York State Labor Law ("Labor Law 220") requires the City of New York to pay its "laborers, workmen or mechanics" the prevailing rate of wages and supplemental benefits paid in the private sector "for a day's work in the same trade or occupation in the locality" where the work is performed. Labor Law §§ 220(3)(a) and 220(5)(a). The rate provided in collective bargaining agreements between private sector employers and unions is deemed "prevailing" if they cover at least thirty percent of "workers, laborers, or mechanics, in the same trade or occupation" in the locality where the work is being done. Otherwise, the prevailing wage is the average wage paid to non-unionized workers, laborers or mechanics in the same trade or occupation in the locality where the work is being done. Labor Law § 220(5)(a).

The City and public employee organizations must negotiate in good faith towards a collective bargaining agreement. If one cannot be reached, the union is authorized to file a verified complaint with the Comptroller on behalf of the employees it represents. The Comptroller must then issue a determination on the prevailing rate of wages and supplemental benefits due the employees ("prevailing wage employees") after an investigation and hearing on the issues. Labor Law §§ 220(8-d) and 220(8). The Comptroller's rules authorize this tribunal to hear prevailing wage disputes. *See* 44 RCNY § 2-02(d)(1) (Lexis 2010).

Procedural History

On May 28, 2002, the Union filed complaints with petitioner, seeking an investigation and determination of the prevailing rate of wages for complainants (Pet. Exs. 1A, 1B). A prior consent determination established the prevailing rates from April 1, 2000, through June 30, 2002 (Pet. Ex. 2). Since then, the complainants have been without a contract. The consent determination permitted the Union to file a complaint on or after July 1, 2002. Because the Union's May 2002 complaint was premature, it filed another set of complaints with petitioner on August 18, 2009 (Kinach: Tr. 46-54; Pet. Exs. 3A, 3B).

On November 24, 2009, petitioner issued a report after investigation, identifying Columbia as the best match for complainants on the basis that Columbia employed more locksmiths than other private sector establishments, its workers performed work on the same types of locking devices as complainants, and the work between the two groups was comparable in scale (Pet. Ex. 5). A preliminary determination issued on November 25, 2008, identified the collective bargaining agreement between the Columbia locksmiths and Local 241 as the "best match," and deemed Local 241 as the prevailing union (Pet. Ex. 7). Petitioner filed the instant petition on August 25, 2009, after the Union and OLR failed to reach an agreement (ALJ Ex. 1).

Positions of the Parties

Petitioner posits that the majority of licensed locksmiths in New York City are retail locksmiths who operate either independently or as part of a small locksmith shop, whereas the locksmiths employed by the City are institutional and/or in-house locksmiths, whose jobs are vastly distinguishable from the retail locksmith. Thus, it focused its investigation on institutional locksmiths. To support its selection of Columbia locksmiths as the best private sector match to City locksmiths, petitioner presented documentary evidence, and the testimony of Wasyl Kinach, the Director of Classifications of its Bureau of Labor Law.

The Union, which agrees with petitioner's conclusion, also presented documentary evidence, and offered the testimony of locksmiths Richard Duskiwicz of Baruch College and Alfred Vignola of the Department of Correction ("DOC"). The Union also offered the testimony of supervising locksmiths Martin Murphy of Bellevue Hospital and James Kenny of the Department of Citywide Administrative Services ("DCAS"). Each witness has over twenty years of experience in both small, independent locksmith shops, and large institutions. Mr.

Murphy, who supervises three locksmiths, stated that he is familiar with the work done at other City hospital locksmith shops, and that it is similar to that done at Bellevue. Sebastian Di Palma, a locksmith estimator for Columbia University, also testified for the Union.

OLR argues that the Comptroller’s investigation was insufficient and rejects the concept of “institutional” locksmiths. It claims that many of the more than 2,000 licensed locksmiths in New York City undertake work similar to that done by the complainants. Accordingly, OLR contends that Columbia’s locksmiths do not comprise at least 30 percent of the locksmiths in the locality where the work is being performed as required by the Labor Law, that Columbia’s bargaining agreement is not prevailing, and even if it was, the Comptroller’s selection of the head locksmith and locksmith A at Columbia are not the best matches for complainants. In support, OLR presented documentary evidence, and the testimony of retail locksmiths Richard Peterkin, Martin Czajkowski, Elliot Leibowitz, and Gary Schoeppler. OLR also presented Yaniv Zohar, Neil Geffner, and Eric Brown, who are not licensed, but own and/or operate private locksmith shops. Donald Schlosser, the assistant vice-president of Columbia’s academic division and Juan Orozco, Director of Licensing at the Department of Consumer Affairs, also testified for OLR.

City Locksmiths

It is undisputed that sixty-six individuals are employed as locksmiths and supervising locksmiths at the following city agencies and colleges (Pet. Ex. 5 at 2; OLR Exs. 10, 11):

<u>City Agency or College</u>	<u>No. of Locksmiths</u>	<u>No. of Supervising Locksmiths</u>	<u>Total</u>
Health & Hospitals Corporation (“HHC”)	24	6	30
Police Department (NYPD)	2	1	3
Fire Department	1		1
Human Resources Administration (“HRA”)	1		1
Department of Homeless Services (“DHS”)	2		2
DOC	15		15
Bronx Community College	2		2
Queensborough Community College	1		1
Kingsborough Community College	1		1
Manhattan Community College	1		1
Hostos Community College	1		1
Department of Education (“DOE”)	5		5

<u>City Agency or College</u>	<u>No. of Locksmiths</u>	<u>No. of Supervising Locksmiths</u>	<u>Total</u>
DCAS	2	1	3
TOTAL	58	8	66

According to petitioner, DCAS’s job specifications (“job spec.”) for locksmiths and supervising locksmiths are standard for all agencies where complainants are assigned (Tr. 55). The most current job spec for the locksmith title is dated August 26, 1998. It requires a locksmith to be licensed by New York City, and have five years’ experience as a locksmith within the previous ten years (Pet. Ex. 4A). It provides that, a locksmith, “[u]nder supervision, does work relating to installation, maintenance and repair of locks and locking devices; [and] performs related work.” Specifically, a locksmith’s tasks include removal, replacement, maintenance, repair and adjustment of all types of locking devices; repair of lock stiles, jambs, and hanging stiles; opening, repair and drilling of safes; changing combinations; making keys with or without the original; setting up and changing key combinations; changing cylinders; making keys to fit a grand master, group master and floor master combinations; instructing designated personnel in the operation of the key control system; and keeping inventory records and preparing material (Pet Exs. 4A, 5, at 3).

The current job spec for the supervising locksmith is dated June 9, 1976 and requires one year of permanent service as a City locksmith (Pet. Ex. 4B). Generally, the supervising locksmith “supervises, directs, and is responsible for the work of locksmiths; [and] performs related work.”

The specific tasks associated with the job include: assigning jobs for locksmiths; supervising them in the installation, maintenance, and repair of locking devices; planning and estimating the cost of work; supervising the maintenance of inventory records; keeping records of production, cost and time; ordering related materials, supplies and equipment; overseeing locksmiths in the proper use, care and maintenance of power and hand tools and equipment; inspecting the work of the locksmiths at various stages; maintaining tight security over the issuance of keys; maintaining a copy of all keys and keeping an adequate supply of key blanks; reviewing drawings, plans and specifications related to locking devices, and evaluating the devices submitted by manufacturers; and, supervising and maintaining responsibility for the proper operation of the locksmith shop (Pet Exs. 4B, 5, at 4).

Union witnesses Mr. Vignola and Mr. Murphy work at DOC and HHC which have the largest concentration of locksmiths, while Mr. Duskievicz' testimony related to six locksmiths at the City colleges. In all, the testimony of the Union's witnesses covered the duties of 54 of the City's 66 locksmiths. While there were many similarities in their job functions, there were also differences based on the needs of each facility. For example, because of its mission, DOC has a higher need for high-level security than other agencies. As such, it maintains equipment that other agencies do not, such as Folger Adams gates and locking devices. Likewise, DCAS locksmiths, whose responsibilities include certain State facilities such as the Queens Courthouse, and the Bronx Hall of Justice, also have complex duties. Supervising locksmiths Martin Murphy and James Kenny perform the duties of locksmiths with supervisory responsibilities (Murphy: Tr. 323; Kenny: Tr. 419).

The complainants testified that their duties include the creation and maintenance of master keying systems at their agencies. A master key system is a pyramidal structural design of the keying system in an entire building or parts thereof with the ultimate purpose of creating and controlling different levels of access. While most keys control access to only one room, a master key controls access to multiple rooms, and a grand master key controls access to all rooms in a certain building or area (Tr. 372-73). The ultimate goal is security of the premises through the maintenance of key control (Duskievicz: Tr. 210). Whether the master keying system is required for new construction or for existing facilities, the locksmith meets with the individual in charge of the space for which a keying system is required, to determine the rooms that need to be keyed, how they will be utilized, who will require access, the levels of access required, the number of keys needed, whether any cross-keying to allow access to multiple areas with one key is required, and the type of key control necessary. For new construction projects, the locksmith is required to review floor plans and work with planning personnel (Duskievicz: Tr. 206-8, 257; Murphy: Tr. 316-19; Kenny: Tr. 369-71, 399, 421; Vignola: Tr. 281-86).

Once a decision is made, the hardware is purchased and the locks and cylinders are installed on the appropriate doors, after the cylinders have been "pinned up." This refers to the placement of different pin sizes within a cylinder, which determine the cut of a key. A master wafer and a spring are also inserted into the cylinder to permit the operation of a master key, an individual key, and a control key. The locksmith is provided with a list of different individuals to whom keys must be assigned. Keys are cut either by hand, or a computer program that creates

combinations of numbers to be used on different doors. The locksmith sends the data from the computer to a code-cutting machine, and the key is automatically cut (Duskiewicz: Tr. 210-19, 223; Murphy: Tr. 320; Union Ex. 10). The numbers relate to the pin sizes in individual cylinders, and correspond to the cuts on each key.

Bellevue locksmiths maintain 10,000 to 12,000 doors in addition to medication boxes, narcotic boxes, and filing cabinets with patient information (Tr. 317). DOC locksmiths maintain the locks on all doors, including cell doors, and gates at the jails and detention facilities. At the Rose M. Singer Center on Rikers Island, where Mr. Vignola works, each housing area contains 30 to 50 cells (Tr. 281-82, 294). Pursuant to section 1-48 of OATH's Rules of Practice, I took official notice that there are ten detention centers on Rikers Island that house over 17,000 inmates.² DCAS locksmiths maintain more than 53 buildings covering over 13 million square feet of property (Tr. 369). That includes security-sensitive buildings such as the Mayor's office, and courthouses, which require a restricted key system. Restricted key systems, which are factory-ordered, come with pre-pinned cylinders which preclude anyone other than the manufacturer from fabricating or duplicating the hardware (Duskiewicz: Tr. 264-65; Murphy: Tr. 339-40, 361; Kenny: Tr. 373, 382; Vignola: Tr. 311-12). DCAS' supervising locksmith, Mr. Kenny, creates the master keying systems and retains control over the systems in that he is the only person authorized to order and purchase blanks from the manufacturer for its master keying systems, which are extremely complex. He explained that the master key systems for individual tenants in the Bronx Hall of Justice, for example, are linked to a "great grand master system" that would operate the entire building. Sub-masters are created to open only certain doors.

DOC, HHC, and DCAS locksmiths described the different types of restricted keying systems utilized by their agencies. Because of the volume of buildings owned or managed by DCAS, the hardware is installed under contract by a contractor. After that, the DCAS supervising locksmith inspects each door, and punches in codes to confirm that the keys are operating, the master key system is working, and every item that was ordered was received. Between the creation of a master keying system, and the completion of construction on a new building, changes may be made that require the locksmith to re-key the system and remove and/or install additional hardware (Tr. 373-74).

² See http://www.nyc.gov/html/doc/html/about/facilities_overview.shtml

DOC uses primarily Folger Adams gates and locking devices. According to Mr. Vignola, these are more suitable for agencies with detention cells, such as exist in courthouses and within the Police Department. Folger Adams creates the master keying system for all new prisons and detention facilities. The factory supplies DOC with the original cutter keys for its locksmiths to make additional keys. DOC locksmiths may order blanks, or keys that are pre-cut to fit the system. They are also responsible for maintenance. The Folger Adams gates which are installed on cells and corridors, are either mechanical, electro-mechanical, or computer-controlled. According to Mr. Vignola, different keying systems exist for different sections of the jails, and upon appointment, new wardens often require locks to be changed. Thus, locksmiths create new master keying systems when necessary. In particular, DOC locksmiths check for “interchange” to ensure that no one key can open multiple locks. If they find “interchange,” key combinations are deleted, cylinders are re-pinned, and keys are re-issued. DOC locksmiths do this in conjunction with a uniformed officer. Mr. Vignola further testified that DOC locksmiths are assigned to maintenance but their primary mandate is security (Tr. 282-83, 285).

Regardless of the facility, maintenance of the master key system comprises a major part of the locksmith’s job. The complainants also install and maintain electro-mechanical, or computer-controlled devices, some of which require the assistance of an electrician because they are connected to a facility’s electric current (Duskiewicz: Tr. 229; Kenny: Tr. 415-16; Vignola: Tr. 294-95, 303-4). Mr. Duskiewicz testified that Baruch locksmiths install electrified locks which involve either “buzzing someone through,” or granting access through a control system that would permit the user to punch in a code or swipe a coded card to release the lock and permit entry. In some instances, the locksmiths install dual-security devices, such as combination locks with card readers. These require a combination code and identification through a card swipe. Mr. Duskiewicz identified one such device for which he maintained sole responsibility for the codes and any changes to them. The locksmiths at Baruch also maintain and repair turnstiles operated by swipe cards through which thousands of individuals gain daily access to the college (Tr. 222-25, 229; Union Exs. 11A-D).

DOC locksmiths maintain a “complicated” system of cells and corridor gates. According to Mr. Vignola, the housing areas (with 30 to 50 cells each) are connected through an emergency release system. The corridor gates are four to five feet wide with steel bars or doors, and multi-layered glass. Some gates also have a rack and gear system, while others have a chain and

sprocket system with electric motor. If a problem is detected, the locksmith must make a determination whether it is mechanical or electrical (Tr. 283-84). At Bellevue, computerized combination locks with punch code systems are programmed by the locksmiths and installed in areas where the hospital needs to track ingress and egress, such as high-traffic areas or areas containing highly-sensitive equipment Tr. 337-38).

All the locksmiths are responsible for key control. This entails keeping records of their keying systems, some of which are computerized. Each witness testified that accurate record-keeping permits an "audit history" of access devices, by providing data on who accesses different areas of a facility, and the frequency of access. This is crucial for high-security areas. It is also useful in tracking keys, if an individual is re-assigned or is no longer with the facility. In the latter case, if keys are not surrendered, the locksmith may have to change locks and re-key the system (Duskiewicz: Tr. 220-22; Murphy: Tr. 338, 353; Kenny: Tr. 374; Vignola: Tr. 287). Mr. Kenny noted that DCAS security, not locksmiths, maintains electronic records on personnel (Tr. 408). DOC locksmiths retain strict control of records such that they differ from site to site (Tr. 292-93).

According to Mr. Duskiewicz, the college locksmiths or respective department heads may either "lock out" an entire group of students who are no longer part of a particular program, or change the combination (Duskiewicz: Tr. 227-29). Swipe card access control, formerly the locksmith's responsibility, is now in the hands of the Information Technology Center (Tr. 258). Computerized records provide details on door identification and location, the associated hardware, the master key system to which a particular door is linked, the cuts of the keys and the pinning of the cylinders. Thus, if a door malfunctions, the data is readily available. In addition, the records facilitate verification of a person requesting the re-issuance of a key, and the key code associated with the area to which the locksmith must grant access (Tr. 379-80).

The locksmiths also maintain manual records including records of work orders. Some locksmiths store blueprints which contain key codes. At DOC, the locksmith submits job information to a Work Order Program Unit that enters it into a computer (Duskiewicz: Tr. 221-22; Kenny: Tr. 403-4; Vignola: Tr. 292, 297-98). Each morning, the DOC locksmiths who maintain the mechanical and electro-mechanical systems work on restoring the locks on cell doors that malfunctioned the previous evening. Locksmiths keep copies of the work orders, and work to resolve the problems with machinists, welders, or electricians, depending on the reason

for the malfunction of the locking devices (Tr. 403-4). At DCAS, work orders are retained by the supervising locksmith. At HHC, besides work orders, the supervising locksmiths are responsible for ensuring that the recipients of access devices such as keys or swipe cards complete and sign key agreement forms. These forms reveal the recipient's name, the room number(s) that the key will access, the department for which the person works, and the key code (Tr. 320; Union Ex. 12).

Locksmiths maintain responsibility for the repair and replacement of locks and locking devices, and access devices such as keys, and swipe cards. The locksmiths all testified that repair and replacement of hardware are done in the normal course of business. For buildings that are designated as "landmark," replacement is not an option because the building's locks are, in effect, extinct. Accordingly, the DCAS locksmiths have to fabricate parts in order to repair and reinstall any defective locks (Kenny: Tr. 398). At DOC, repair or replacement of locks is required not solely because of usage but as a result of the deliberate attempts of inmates to break or damage locks to avoid being locked up in a certain area. The locks are either repaired or replaced depending on the level of damage (Vignola: Tr. 284).

Replacement of lost keys at DOC is based on the unique circumstances under which they are lost, and whether the lost key is a restricted key. For instance, Mr. Vignola testified that because of the high probability that a key that has been lost at a detention house will end up in the hands of an inmate, the locksmith must re-pin the cylinders and re-key the locks. However, re-pinning of cylinders is not a major part of the DOC locksmith's responsibility. If the key is lost outside the facility, the warden determines whether or not the locks have to be re-keyed. In the alternative, the person requesting a replacement has to present the locksmith with an approved key requisition form. The locksmith will code-cut a replacement key from a factory-generated set of codes provided for mechanical locks only (Tr. 284, 286-88). The use of interchangeable cores in the cylinders facilitates re-pinning if a key is lost or stolen (Tr. 373). According to Mr. Duskiwicz, not all locksmiths are trained to work with interchangeable cores. When he worked as a retail locksmith, he did not work with them. He stated that several locksmiths with whom he had spoken during the past two years had no experience with interchangeable cores. On the other hand, it is common for institutional locksmiths to work with interchangeable cores (Tr. 254, 270).

Likewise, at HHC, if the lost key is a restricted key, the locksmith may wait a few days to see if the key will materialize. If not, the locksmith will re-key the area to which the lost key facilitated access. Because a restricted keying system is uniquely dedicated from the manufacturer for the purchaser of the locking device, the key cannot be replaced by a retail locksmith, only by the in-house locksmith (Tr. 324). At Baruch, replacement keys are either cut by code after the locksmith remits the key code via computer to the facility's code-cutting machine, or by duplication. The latter process requires the locksmith to trace the original key (where one exists) onto a blank (Tr. 223). Re-keying of restricted key systems also comprises part of the DCAS locksmiths' responsibilities (Tr. 369).

Locksmiths also ensure that safe exit devices are installed and maintained in compliance with the Fire Safety Codes. DOC locksmiths are responsible for probe keys, which are used in emergencies and for ensuring that ingress and egress are unimpeded (Tr. 283). At Baruch, locksmiths install and maintain panic bars on the emergency exit doors of large assembly rooms to facilitate a quick escape in the event of an emergency (Tr. 235-36). Similar devices are installed at Bellevue Hospital (Tr. 316, 336). The DCAS locksmiths are responsible for the installation and maintenance of multiple electronic exit devices such as rim, control rods, vertical rods, and electronic strikes. Mr. Kenny identified examples of such devices that he has personally installed, and testified that some of them require the locksmith to either cut or construct a metal frame to house the device (Tr. 392-93; Union Exs 4, 5).

Basic tasks of the locksmiths include the storage of keys and key blanks (some of which are restricted), pinning kits, and an adequate inventory of hardware. Locksmiths at the colleges are also required to ensure that disabled individuals have equal access to areas where locks and locking devices are installed, in compliance with the Americans with Disabilities Act (Tr. 235).

Supervising locksmiths Martin Murphy, of HHC, and James Kenny, of DCAS, perform work similar to the locksmiths they supervise, in addition to functions that are uniquely supervisory. For instance, both review drawings and floor plans before creating a master key system. Mr. Murphy is singularly responsible for obtaining and retaining signed agreements from key recipients. Likewise, Mr. Kenny is the only locksmith authorized by DCAS to order blanks for the restricted key systems in DCAS buildings. He retains work orders and blueprints for different buildings, maintains key and keying system records for all City-owned or leased buildings, assigns jobs to subordinates, plans and estimates the cost of jobs, evaluates tasks and

standards, orders materials and supplies, evaluates locks and locking devices from manufacturers, and supervises the locksmith workshop (Tr. 418-21).

OLR submitted job descriptions for “locksmith” and “supervisor locksmith” at HHC in general, and for Elmhurst Hospital in Queens (Resp. Exs. 5a, 5b, 5d, 5e). They essentially replicated DCAS’ job specs (Pet. Exs. 4a, 4b). OLR also submitted descriptions for Woodhull Hospital which appeared to be more detailed and current than DCAS’ job specs. The description for locksmith was undated, but included as a primary function, maintenance of a “computerized key management system.” It also required locksmiths to be knowledgeable in “[i]nterpreting and using blueprints and layouts related to lock systems,” “implementing pre-defined master key systems,” and “computers and keyboard operation” (Resp. Ex. 5f). The Woodhull job descriptions appeared to validate Mr. Murphy’s testimony on the duties of HHC locksmiths.

In addition, OLR submitted an affidavit dated February 8, 2010, from Anne Chamberlain, Director of Workforce Planning and Analytics at CUNY from November 2003 through January 2010. Ms. Chamberlain affirmed that she was familiar with the duties of locksmiths within the CUNY network, and itemized those duties (Resp. Ex. 15). She also maintained that CUNY locksmiths did not perform any work related to the installation, repair or maintenance of key card access locks. After trial, OLR submitted an addendum to Ms. Chamberlain’s affidavit with a CUNY locksmith job description issued on August 8, 2004. There were marked unexplained differences between the itemized duties on the job description and Ms. Chamberlain’s previous affidavit. For instance, the only master key related duties identified in her earlier submission was the making of keys to fit a grand master, group master or floor master combination. The job description that accompanied the later submission identified duties that were more significant. It revealed that the CUNY locksmith creates master key systems both manually and with the use of computer software, and expands master key systems according to manufacturers’ specifications. While Ms. Chamberlain’s affirmation claimed that the locksmith had no involvement in work “involving or relating to the installation, repair or maintenance of key card access locks,” the job description indicated that the locksmith: distributes keys and access cards to appropriate personnel; maintains a log of keys/access cards distributed to designated personnel; and keeps records of keys and access cards recipients. Thus, the duties listed on the job description were consistent with Mr. Duskiwicz’ testimony.

OLR also presented affidavits from Angelo Landriscina, a supervisor of mechanics at the DOE, which has five locksmiths, and James Russo, Assistant Commissioner at DHS, which has two locksmiths (Resp. Exs. 13, 14). Thus, collectively, these affidavits purported to represent about ten percent of the City locksmiths. Both Mr. Landriscina and Mr. Russo claimed to have direct knowledge of the duties and responsibilities of the locksmiths at their respective agencies but did not indicate how that knowledge was acquired.

In sum, the duties of the City-employed locksmiths are varied, and the level of sophistication and complexity of their work depend on the agency where they are employed. In other words, their tasks are not all identical. Generally though, their duties across the board include: creation and/or maintenance of master keying systems, including pinning and re-pinning and keying and re-keying cylinders; key control, including cutting keys automatically or by hand; access control which is linked to their record-keeping functions; installation of hardware for exit devices such as panic bars, repairing and maintaining locks and locking devices; and storing keys and key blanks, and pinning kits.

Besides supervising, maintaining responsibility for the work of, and performing tasks similar to their subordinates, supervising locksmiths maintain records of key recipient forms (HHC) and work orders, and inventory, order materials (DCAS), read drawings and floor plans, order/purchase key blanks (DCAS), and estimate the costs of jobs (DCAS).

Regardless of title, the City-employed locksmiths and supervising locksmiths characterized themselves as “institutional” or “in-house” locksmiths, and sought to distinguish their jobs from that of retail locksmiths. All testified that they had worked at small retail locksmiths shops prior to their tenure with the City. According to them, retail locksmiths engage primarily in residential work, such as: the installation or changing of cylinders which come pre-packaged with keys from the manufacturer, so that no keying or pinning is required; providing access to front doors or car doors where the resident or driver is locked out; and, duplicating a key from an original or from an impression. Retail shops have few or no corporate clients, and are rarely involved in the creation, installation, and maintenance of master key systems, which comprise a major part of an institutional locksmith’s job. As a corollary, retail locksmiths are not required to review blueprints of buildings. Nor are they required to control keys or keep codes. Mr. Kenny recalled only one occasion on which he “pinned up” a master key that was not part of a system. Mr. Vignola stated that even where a retail locksmith undertakes re-pinning for

a corporate customer, the customer only gives the locksmith temporary access to its keying system. The institutional locksmith, on the other hand, has permanent access to the keying system where he works. The locksmiths also claimed that a vast amount of record-keeping is required of the institutional locksmith, which is almost non-existent for the retail locksmith. Mr. Vignola testified that, as a retail locksmith, his record-keeping was relegated to job orders. Mr. Duskiwicz stated that a retail locksmith may keep records in cases of residential lockouts where he is required to obtain proof of home ownership from the customer before providing access (Murphy: Tr. 347-50; Vignola: Tr. 290-93; Duskiwicz: Tr. 236-37; Kenny: Tr. 398-400).

The locksmiths also asserted that they work with complex, high-security end-products and that retail locksmiths use simpler and cheaper products. Thus, they projected that the retail locksmith would be unable to assume the responsibilities of institutional locksmiths, such as mastering and maintaining a key cylinder system without significant training. Each recognized that the system at his agency was unique to that agency. However, Mr. Kenny admitted that, even as an experienced institutional locksmith, if he went to another institution, to wit, Columbia University, which petitioner put forth as the most comparable private sector match to the City-employed locksmiths, he would have to be trained on their system. He stated that, generally, the length of the learning curve depended on the individual's experience.

The Comptroller's Investigation and Preliminary Determination

Wasył Kinach, and Paul Brumlik, associate project manager in petitioner's Bureau of Labor Law, led the investigation that resulted in the Comptroller's preliminary determination that Columbia University locksmiths were the most comparable match to the complainants.

Mr. Kinach, who accompanied Mr. Brumlik on visits to some locksmith shops, testified that petitioner commenced its investigation by obtaining the job specifications for the subject job titles from DCAS (Tr. 54). Investigators visited three City locksmith shops - DCAS Central Locksmith Shop, and Coney Island Hospital ("CIH"), in Brooklyn; and Baruch College in Manhattan (Tr. 151). It was undisputed that DOC employs more locksmiths than DCAS, but Mr. Kinach claimed that because of security and access concerns, an internal decision was made to forego a visit to DOC (Tr. 139, 589-90). Petitioner visited Baruch at the Union's suggestion, and because it was "convenient" and "not far" (Tr. 140). CIH was also visited at the Union's suggestion (Tr. 144).

Mr. Kinach and/or his investigators visited private institutions because they retained in-house locksmiths including: Cabrini Medical Center (“Cabrini”), Columbia University, Barnard College (“Barnard”), and 222 Broadway, in Manhattan (Tr. 80). The investigation also included a telephone discussion with a locksmith at Fordham University (Pet. Ex. 5, at 7). Petitioner selected Columbia’s locksmiths as the most comparable match to complainants because they performed similar tasks, both in volume and type. It also found the equipment at Columbia to be a closer match to the City’s than any other site visited (Tr. 81-88, 189).

Petitioner chose Columbia’s “head locksmith” as the position most comparable to the City’s supervisor locksmith because both have supervisory titles and are entrusted with similar duties as their subordinates (Tr. 124-25). Further, petitioner identified Columbia’s “locksmith A” title as the closest match to the City locksmith based on the similarity of duties performed and equipment used (Tr. 126-27).

During its visit to one of Columbia’s three locations, petitioner’s investigators observed five locksmiths. Based on that observation, petitioner concluded that Columbia hired 10 to 15 locksmiths, including head locksmiths. Accordingly, petitioner offered Columbia’s locksmiths as the largest number of unionized locksmiths working in the private sector in New York City (Tr. 81-81, 106-7, 122, 582-83, 608-9). After selecting Columbia as the most comparable group, petitioner assembled data regarding contracts and benefits (Tr. 109-11, 117-18, 135-36, 158, 193; Pet. Ex. 6). According to Mr. Kinach, the Comptroller’s preliminary determination contained all relevant information that was collected during petitioner’s investigation that would support its selection of Columbia as the best private sector match (Tr. 556-57).

OLR produced documents from the Comptroller’s investigation including a memorandum dated September 27, 2007, captioned, “RE: Meeting with Locksmiths” (Resp Ex. 19). Mr. Kinach testified that he was present at the meeting. He could not remember all the participants, but recalled that they were persons who were responsible for the selection of the best private-sector match to the City locksmiths (Tr. 583-88). The memo contained a summary of the number of City locksmiths and supervising locksmiths, some of the agencies at which they worked, and comparison sites. The memorandum indicated that the majority of locksmiths were employed at DOC, large independent contractors, the Carpenters’ Union, and Columbia and New York University, and noted that the latter two hired the most locksmiths in the private sector. The memo also indicated that “[t]here is no 30% threshold; or prevailing union.”

Mr. Kinach maintained that prior to visits to the City locksmith shops, petitioner assumed that independent locksmiths were a more appropriate match to City locksmiths. However, based on the investigators' observations of the actual work done by the City locksmiths, a decision was made to forego visits to independent contractors, and confine its investigation to in-house or institutional locksmiths in the private sector where it felt that a suitable match would be found (Tr. 588-95, 609-10). At the Union's prompting, Mr. Kinach agreed that the major difference between retail and institutional locksmiths is the significant time that the latter group spends on the installation and maintenance of keying systems (Tr. 615-16). He opined that, "anybody who is an independent contractor is a gun for hire," who is primarily profit-driven, and only interested in racking up sales, whereas a City locksmith is "in-house personnel" who "has a vested interest in the facility" (Tr. 603, 618-19, 622-28). Accordingly, Mr. Kinach insisted that even if an independent contractor performed duties similar to the City locksmiths and were unionized, he would still support the selection of Columbia as the most comparable match (Tr. 630-31).

Work Performed by Columbia University Locksmiths

Sebastian Di Palma, vice-president of Local 241, has been employed at Columbia for 16 years. Ranked from highest to lowest, the locksmith titles at Columbia are: head locksmith; locksmith estimator; locksmith A; and locksmith B. Mr. Di Palma was a locksmith B from 1994 to 1995, a locksmith A from 1995 to 2000, and a locksmith estimator since 2000 to present. As estimator, his job involves some of the duties of a locksmith A. Mr. Di Palma averred that he is familiar with the duties and responsibilities associated with each locksmith job title. He testified that on a fairly consistent basis since 2002, Columbia retained four locksmiths including one head locksmith in its Academics division, two in its Residence division, and four, including one head locksmith, in its Health Sciences division. The head locksmith supervises all locksmiths (also known as mechanics), assigns them work, cuts keys, maintains control of the keying system, responds to emergency calls regarding lock-ins or lock-outs, and shares responsibility with the locksmith A in creating master keying systems. The locksmith A undertakes all assignments from the head locksmith, including new installations and repairs, and creation of master keying systems, and supervises the locksmiths B. As assistant to the locksmith A, a locksmith B's duties are limited in scope with respect to new installations, but they complete repairs and replacements like a locksmith A. According to Mr. Di Palma, the A and B positions

require seven and five years of locksmith experience, respectively. His testimony focused on the duties of the head locksmith and the locksmith A (Tr. 434-37, 439-41).

Mr. Di Palma testified that either the head locksmith or the locksmith A may create a master keying system, which may involve multiple locksmiths. It first requires a site survey of every job, checking doors and the hardware used, and completing repairs that need to be made prior to new installation. For new construction, the locksmith obtains blueprints and reviews the floor plans, and schedules the hardware. Columbia's choice of hardware remains consistent in terms of manufacturer. The locksmith obtains information on access requirements, and the number of keys to be cut. This is extensive because of the number of students at Columbia's various faculties. The locksmith creates the coding system which may be numerical, alphabetical, or alpha-numeric, depending on the size of the master key system. The locksmith retrieves hardware from stock, pins up the cylinders, cuts keys, marks the cylinders according to the code numbers designated through the creation of the keying system, and installs them in the appropriate doors. The locksmith maintains the master keying systems on a daily basis. They may also be called upon by the Public Safety Division to perform audit trails on certain units because the locksmith keeps physical and computerized records of the cylinders, the doors on which they have been installed, the keys that have been cut for each, and the recipients of the keys. However, Mr. Di Palma noted that some records are retained by Department heads. He also testified that this function is being "phased out." The locksmith also retrieves keys from employees or students who are no longer part of the Columbia network (Tr. 441-43, 448, 462).

Key-cutting by code is also part of the locksmith's daily function. The locksmith reviews and updates records, and informs the end user if too many keys have been cut, thereby compromising key control and security. This may require the locksmith to replace cylinders. For key control purposes, Columbia has restricted key systems. Thus, key replacements can only be generated through Columbia's locksmiths who are custodians of the codes, and cannot be re-created by a retail locksmith. Approximately half the day is spent on key control (Tr. 443-45).

Columbia uses both mechanical and electrified locking devices. Most of the electrified devices permit access by code or card-swipe. Some of the electrified combination locks require code punch-ins. Mr. Di Palma noted that some department heads purchase the electronic hardware with the appropriate software, and codes are programmed directly into a student's swipe card, without input from the locksmith. For security purposes, namely, protection of

students' social security numbers, the department heads maintain the codes. In such cases, the locksmiths are only responsible for the upkeep of the keying and locking devices. Where electrified combination locks are used, the locksmith installs them with key bypass because no records of combinations are given to the end users. Thus, if a plumber, for instance, needed to work in an area that is secured by a combination lock, the locksmith may grant the plumber access by virtue of the key bypass. If mortise locks are used, the installation is more complex because it requires the locksmith to cut into the door, as opposed to boring through it. The locksmiths also install rim exit devices, vertical rod devices, and panic bars (Tr. 448-50).

Mr. Di Palma was familiar with the equipment depicted in the multiple photographs of Union Exhibit 10, such as a removable core plug, a pinning set, key-cutting machine, a mortise shell for a removable core cylinder, an Omni lock, and a Medeco key-coding machine, among others. He testified that Columbia uses different manufacturers but its equipment is similar to those displayed in the exhibit (Tr. 446-47, 451-55).

Even though he did not characterize the work of the Columbia locksmith as "institutional" or "in-house," Mr. Di Palma nonetheless distinguished it from his prior "retail" work experience. Prior to Columbia, Mr. Di Palma worked in the "Diamond District" where the locking systems, which consisted of dead bolts that worked in conjunction with each other, were more complicated. He also worked at a retail locksmith shop that serviced individual clients, as well as clients that specialized in large construction projects. While the two locksmiths who serviced the construction clients created master key systems, it was not a major part of their job, and they did not maintain a customer's key codes (Tr. 445, 449-50).

OLR sought to refute Mr. Di Palma's testimony with the testimony of Donald Schlosser, the assistant vice-president of Academic Facilities Operations at Columbia. Mr. Schlosser, who is not a licensed locksmith, testified that he oversees the trades including electrical, plumbing, carpentry, locksmiths, painters, and masonry (Tr. 642). He corroborated Mr. Di Palma's testimony that there are four locksmiths in the Academics Division, and two in Residential. Mr. Schlosser expressed uncertainty as to the total number of locksmiths at Columbia, and stated that he could only be sure about his own division. He acknowledged that Columbia's collective bargaining agreement covered several other divisions (Tr. 642-43, 657-59; Pet. Ex. 6A).

Mr. Schlosser admitted to being a "couple steps removed" from the direct work of the locksmiths, but claimed that there is little difference between locksmiths A and B. He

maintained that all the locksmiths, including the locksmiths B: install locks, make keys, set up master keying systems using a Multi-Lock system made exclusively for Columbia; install key card access locks, re-pin cylinders; and install panic hardware (Tr. 643-45). At the same time, Mr. Schlosser indicated that a locksmith B is in a “training role” and “[o]nce he knows all facets and he is fully up to speed on all systems, you know, he is able to be promoted” (Tr. 645). During cross-examination, Mr. Schlosser testified that the locksmith B learns from the locksmith A and head locksmith (Tr. 651). In terms of hierarchy, the overall responsibility for the locksmith shop is borne by the foreman of the carpentry and lock shop, to whom the head locksmith reports. The foreman distributes work orders to the head locksmith who, in turn, assigns them to the locksmiths (Tr. 646, 652). He rejected as inaccurate the notion that the head locksmith supervises the locksmith A who, in turn, supervises the locksmith B (Tr. 647).

OLR presented three undated job descriptions for Columbia’s head locksmith, and locksmiths A and B, that it received as part of a package from the Comptroller’s office (Resp. Ex. 19). According to the job descriptions, a locksmith A is required to have five years’ experience as a journeyman in the carpentry trade, and two years in the locksmith trade. It further provided that the locksmith A: perform work pursuant to job work orders and maintenance orders in preventive maintenance; repair and install door hardware and locking devices; and be expert in setting up master key and sub-master key systems, cutting keys, picking locks, opening safes, and resetting combinations. The locksmith A must be skilled in the use of all hand and power tools used by carpenters and locksmiths, and have good knowledge of the methods and materials common to both trades. On the other hand, a head locksmith is required to have five years each as a journeyman in the carpentry and locksmith trades. Besides the additional experience in the locksmith trade, the only difference between the descriptions for locksmith A and head locksmith was a provision that the head locksmith “will assume responsibility for the proper conduct of the ship [sic] in the absence of the foreman and assistant foreman[,] [s]hall oversee and advise other mechanics in the proper use of tools and materials and the proper observation of safety rules and regulations in the course of their work.” Mr. Kinach testified that he and his investigators gave considerably more weight to actual work that they observed being done by the Columbia locksmiths, than to the job descriptions which appeared to understate the locksmiths’ duties (Tr. 604-5). Mr. Schlosser claimed that the documents were accurate reflections of the duties required, but expressed doubt about the

carpentry experience requirement. When pressed about the accuracy of the locksmith A job description, Mr. Schlosser remarked that “[t]his job description could be tweaked.” The description for the locksmith B imposed no requirement for carpentry experience. Instead, it required four years as a journeyman in the locksmith trade and one year as a Mechanic C. This time, Mr. Schlosser indicated that both the job duties and the experience for the locksmith B were accurate (Tr. 647-49, 656).

Mr. Schlosser further admitted that Columbia’s locksmiths would be more familiar than he with the actual work done by them. Further, while he acknowledged that the job descriptions omit mention of swipe cards, his explanation that the locksmith’s only involvement is in the installation of the related hardware essentially corroborated Mr. Di Palma’s testimony. Mr. Schlosser also corroborated Mr. Di Palma’s testimony that Columbia’s individual departments, and not its locksmiths, retain computerized control of its key card access (Tr. 653-55).

Retail Locksmiths in New York City

There are currently over 2,000 licensed locksmiths in New York City, and the numbers have remained consistent for a number of years (Tr. 698-701; Resp. Exs. 8, 21, 22). OLR contends that by limiting the scope of its investigation to in-house locksmiths, the Comptroller overlooked a universe of retail locksmiths who perform the same kind of work as complainants.

OLR’s witnesses represented 56 locksmiths who are currently employed at their respective firms. With one exception, all testified that during the relevant period from July 1, 2002 through December 31, 2009, the number of locksmiths at each firm fluctuated, with the majority experiencing a downward spiral due to the economy. Of the 56 locksmiths represented by OLR’s witnesses, only four employee locksmiths at one firm are unionized. The following is a visual of the firms represented by OLR’s witnesses, the number of locksmiths at those firms, and classification of work done by those locksmiths based on their testimony:

Retail Locksmith Firms	No. of Supervising Locksmiths	No. of Locksmiths	Commercial and Industrial Work	Residential Work
Highway Locksmiths	1	7	100% commercial & industrial	
Midtown Security	1	6	95% commercial	
AAA Architectural Hardware		9	90 % commercial	
Central Lock & Security	2	4	Mainly commercial	

Systems				
Paragon Security & Locksmiths		10	50 % commercial	50 % residential
Abbey Locksmiths		15		Mainly residential
East Coast Locksmiths		1		Mainly residential
TOTALS	4	52		

Highway Locksmiths

Mr. Liebowitz, a licensed locksmith since 1970, owns Highway Locksmiths (“Highway”) in Brooklyn. Highway has eight licensed locksmiths (including Mr. Liebowitz), and its services are exclusive to commercial and industrial clients. Mr. Leibowitz performs locksmithing duties and also supervises the other seven locksmiths. He testified that one-third of Highway’s business is derived from City contracts, and currently, it has 891 bids outstanding with the City. The number of locksmiths at Highway changes based on the number of contracts awarded. Also, the locksmiths’ duties are contingent on the contract requirements of each job and the individual skills of his locksmiths. Mr. Leibowitz stated that he is the Highway locksmith who is proficient in all the locksmithing duties offered (Tr. 788-91, 800, 813-14, 820). Further, five of Highway’s eight locksmiths can create master key systems (Tr. 832). Only about one percent of their time is spent on creation while about 40 percent is spent on maintaining existing master key systems. In the past, it had been awarded contracts for work at the Brooklyn and Queens district attorneys’ offices, the Department of Finance, the Sheriff’s Department, the Comptroller’s office, and the DHS, to name a few (Tr. 791, 796, 812-13).

Highway retains the codes for 99 percent of its clients for whom it has created or installed a master key system, and its locksmiths are able to cut keys by code for them. Where a master key system is already in place, Highway locksmiths may be given access to the client’s codes just for the duration of the contract (Tr. 792-93, 832). Highway does not have confidentiality agreements with all clients for whom it retains codes, because not all clients require such agreements (Tr. 803). Besides that, it does not keep a record of key recipients. As such, its locksmiths are unable to perform audit trails (Tr. 798-99).

Highway’s locksmiths spend most of their time on repairs and installations, including re-pinning and re-keying cylinders for stand-alone or master key systems (Tr. 794, 837). They also install and maintain the hardware for card key access locks, but programming is done by the in-

house end-user (Tr. 794-95). In addition, its locksmiths install, repair and maintain electronic locks, including Magnatronics locks at banks, and combination locks on doors and safes (Tr. 795). Mr. Leibowitz acknowledged that there are other locksmith shops that perform similar functions as Highway, but maintained that most retail locksmith shops do not possess his locksmiths' and his expertise (Tr. 811-12).

Midtown Security

Mr. Czajkowski is the Vice President in charge of Operations at Midtown Security ("Midtown") in Manhattan, where he supervises seven locksmiths. He testified that due to the economic downturn, that number was significantly depleted from about 12 to 13 locksmiths during the earlier years of the relevant period (from 2002 to current). At the time of hearing, Mr. Czajkowski testified that his locksmith license had expired and he was in the process of renewing it. He described Midtown as "a full-service locksmith that mostly does commercial accounts in the City, Midtown, and Downtown." In terms of percentages, he quantified that 95 percent of Midtown's work is commercial (Tr. 713-15, 734, 749).

Mr. Czajkowski testified that only he and the owner design master key systems. Midtown works with five restricted key manufacturers, but Medeco systems comprise about 80 percent of the master key systems that he and the owner install. With Medeco's help, he has designed master key systems for entire buildings. Mr. Czajkowski testified that he has designed master key systems for large corporate clients, which he or the other locksmiths maintain (Tr. 717-19, 735, 747-48). Also, Midtown retains key codes for the restricted key systems that it installs, and is able to cut keys by code (Tr. 716, 718). Where it installs a Medeco system for a corporate client, Midtown executes a confidentiality agreement secured by Medeco (Tr. 736-37). Likewise, Midtown maintains codes even if the system installed is another manufacturer's, and might execute confidentiality agreements, which it retains, depending on the end user (Tr. 738). Midtown has no automatic code-cutting machines, only manual ones, two of which are Medeco machines which are used on a daily basis (Tr. 727). The locksmiths also undertake re-pinning of cylinders and re-keying. Mr. Czajkowski identified Medeco pinning kits in the Union's exhibits and declared that Midtown has four such kits (Tr. 725; Union Ex. 10C). Midtown maintains numbered key tags and keeps a folder on different key cuts (Tr. 729-30).

The locksmiths also install the hardware for card key access locks, but their involvement ends there. According to Mr. Czajkowski, “it’s more of an electrical thing” (Tr. 721). Thus, the locksmiths install the electric strikes but do not maintain codes for proximity card readers (Tr. 716, 721). Midtown keeps a record of each lock that its locksmiths install, but does not keep a record of key recipients. Therefore, the locksmiths cannot perform audit trails (Tr. 739-41).

Midtown’s locksmiths also install panic bars (Tr. 722), and repair and replace locks on cabinets and safes, including combination locks (Tr. 16). Mr. Czajkowski stated that Midtown adopts the most cost-effective activity for its client. But even where the client wants a new installation as opposed to repairs, Midtown does not charge a commission on the sale of a new lock (Tr. 723-24). Mr. Czajkowski stated that he is familiar with the work done by other locksmith shops, and stated that Midtown’s work is typical for some of the locksmith shops in Midtown and Downtown because “[t]hat’s w[h]ere all the office buildings are.” Otherwise, he opined that in the other boroughs, many locksmiths are not engaged in the kind of work done by Midtown (Tr. 746, 748).

AAA Architectural Hardware

Mr. Brown manages AAA Architectural Hardware (“Triple A”), his family-owned business, which he describes as “a locksmith company and a door hardware distributor.” He is not a licensed locksmith but Mr. Brown oversees Triple A’s nine licensed locksmiths (Tr. 854-56). Mr. Brown testified that Triple A has four operating units: (1) a retail unit, which services the needs of walk-in customers who need to have keys made or wish to purchase small goods; (2) a service department with eight field locksmiths who are dispatched to repair and/or replace door hardware items; (3) a master keying department with one licensed locksmith and two associates; and (4) a door hardware division of project managers who supply door hardware to contractors (Tr. 855). Ninety percent of Triple A’s clients are commercial and its locksmiths work on anything that relate to the installation and/or repair of door hardware (Tr. 856, 865, 968-70). When the field locksmiths get called to service a client’s master key system that is controlled by Triple A, they bring the work back to the office where all keying work is done. Triple A’s locksmiths create simple master keying systems, while the licensed locksmith in its master keying department creates more elaborate systems. This excludes the creation of master key systems for entirely new buildings. Mr. Brown stated that 75 percent of Triple A’s work has

a “keying” component. For instance, if the service call requested a lockset replacement, and the lock and cylinder to be serviced are part of a master key system controlled by Triple A, the job is considered a “keying” job. The locksmiths also perform re-keying jobs and re-pinning of cylinders for Triple A’s corporate clients (Tr. 856-59, 865, 867-71).

Triple A’s master keying department retains key codes for 75,000 to 100,000 doorways in the City, either in spreadsheet form, some other form of computer record, or in handwritten files in a locked cabinet (Tr. 858-59, 862-63). Triple A locksmiths install electronic locks, some of which have starting codes. Mr. Brown explained that after the codes are turned over to the clients, some may change and maintain the codes themselves. Triple A does not keep records of the people who have access to different doors in buildings where Triple A controls the master key systems. Therefore, no audit trails can be performed (Tr. 863-65).

According to Mr. Brown, the locksmiths also install electromagnetic locks which require the placement of a magnet at the door header and securing it to a plate which holds the door in place until opened electronically (Tr. 859-60). He also understood the basic concept of a panic bar and stated that Triple A’s locksmiths “perform work” on them (Tr. 861). Likewise, Mr. Brown explained that a card key access lock is a system that uses a key or key card to release an electric strike in an electric lock, and stated that Triple A’s locksmiths perform work on them. It was unclear whether their involvement included the electronics aspect, or whether they were responsible solely for the hardware installation (Tr. 860-61).

Residential work done by Triple A is confined to the installation of new cylinders, repairs, re-keying of front doors, and lock replacement (Tr. 860). Mr. Brown testified that Triple A makes no commission if it sells a new locking device to a commercial client (Tr. 861). He admitted that Triple A, with its large concentration of commercial clients, was different from other small retail locksmith shops (Tr. 867).

Central Lock & Security Systems

Mr. Peterkin, a locksmith for 49 years, co-owns Central Lock and Security Systems (“Central”) in Manhattan (Tr. 505-6). Central is not open to the general public and services primarily corporate clients which are identified on its website (Tr. 538-39; Resp. Ex. 17). All, but one of Central’s clients, are located in midtown and downtown Manhattan (Tr. 533). It has six licensed locksmiths (including Mr. Peterkin and the co-owner). That number has fluctuated

between four and seven during the relevant period. Its four employee locksmiths are unionized. Neither Mr. Peterkin nor the co-owner is as actively involved in the installation or maintenance duties as their employees. They respond only to requests for them personally. Otherwise, they are involved in the administration of the business (Tr. 543-45).

Mr. Peterkin summarized that Central's locksmiths create master keying systems, duplicate keys for doors and desks, open locks, service locks, service door hinges, and undertake high security key control systems (Tr. 507-08). Central installs and maintains electronic locks including key card access readers. Most times, its locksmiths train the client on programming the cards and their involvement ends (Tr. 534-35). Central maintains key codes for its clients if it has the key blanks. Key blanks are not distributed by the manufacturer to every locksmith, and thus, Central may not always be the custodian of the blanks. Instead, the owner of the building where the master keying system was installed may order and retain control of the blanks, and thus maintain its own key codes. Where Central has control of the blanks, the codes for the keys are stored in its computer, and keys may be cut by code. However, if a customer wants a key cut, a formal request has to be made to Central on the appropriate company letterhead, or by e-mail. Mr. Peterkin maintained that Central executes agreements with restricted key manufacturers, in effect committing itself to releasing keys only to known clientele (Tr. 509-11; Union Ex. 12). Most of Central's customers perform their own audit trails, but some prefer audit trails to be done by Central (Tr. 537).

Mr. Peterkin added that Central's locksmiths also work on re-pinning cylinders, and installing panic bars, electronic and magnetic locks, and key card access locks. He stated that until recently, he required only a locksmith's license to perform the type of work that Central does. He now requires a low voltage license which he obtained in order to install systems that use low voltage electricity (Tr. 512-13). Mr. Peterkin acknowledged that some locking and security devices require wiring diagrams, and only two of his locksmiths work on the electronics products. Those locksmiths install the hardware and run the wiring for the electric strikes. They also install security cameras which they connect to monitors or digital video recorders (Tr. 515-16, 547-48; Union Ex. 6). Photographs revealed that much of Central's equipment is similar to that used by the City locksmiths. However, Mr. Peterkin noted that his code-cutting machines were manual, not computer-operated. He opined that generally, retail locksmiths work with

more manufacturers than institutional locksmiths whose experience may be restricted to the manufacturer of the locks installed in the building where they work (Tr. 542).

Paragon Security & Locksmiths

Mr. Zohar owns Paragon Security and Locksmith (“Paragon”), which employs eight full-time locksmiths, and two licensed, independent contractors. Fifty percent of its clients are residential and fifty percent are commercial (Tr. 501). A printout from Paragon’s website supported that its targeted clients are both commercial and residential (Resp. Ex. 16). Mr. Zohar testified that Paragon offers a wide range of services including door and gate installations, electronic systems installations, access control, camera systems and alarms (Resp. Ex. 16). Paragon has one main store and eight service locations for key-cutting (Tr. 487).

According to Mr. Zohar, Paragon’s locksmiths create and install master key systems “all the time.” He identified a number of lock manufacturers that Paragon uses (Tr. 481, 489). When Paragon creates the master key system, it retains key codes for about ninety percent of those clients, even though it has no confidentiality agreements with most. Mr. Zohar maintained that Paragon’s maintenance of master key systems include repairing or replacing locks, changing or re-pinning cylinders and re-keying systems, and replacing lost keys. Paragon’s locksmiths also install, maintain and repair key card access locks. Its locksmiths are responsible only for the installation and maintenance of the hardware associated with the key card access system, while its electrical staff is responsible for the electrical work connections required to complete the installation of such locking devices. Likewise, the locksmiths install and maintain hardware for the panic bars (Tr. 481-83, 486-87, 491).

Mr. Zohar testified that Paragon has rendered services to a number of City agencies, including the DOE, Transportation, DOB, HRA, and the Comptroller. He insisted that for one of those agencies, Paragon maintained the system that it had installed, and if an employee’s key had to be replaced, the authorized City personnel would contact Paragon, and the keys would be made and delivered to the agency. He stated that the agency later requested custody of its codes (Tr. 484, 491-93).

Paragon’s work on residences includes buildings of various sizes, both within and outside New York City, including upstate New York and Long Island (Tr. 498-500). It has service contracts with some of its clients, and its remuneration is based either on the number of service

calls it makes, or on monthly service charges that cover services or parts, or both (Tr. 494). Paragon imposes no fees for storage of a client's codes, but when the client requires services such as repairing locks, changing cylinders, or key replacements, it charges on an hourly basis (Tr. 498-99). Mr. Zohar asserted that the services that Paragon provides are atypical of at least seven other locksmith establishments with which he is familiar (Tr. 487-88). He admitted that Paragon's locksmiths had little practical experience when hired, and had to be trained (Tr. 497).

Abbey Locksmiths

Neil Geffner, is a principal of Abbey Locksmiths ("Abbey") in Manhattan, which hires about 15 locksmiths. He is also the locksmith coordinator and dispatcher (Tr. 838-39, 853). Mr. Geffner testified that Abbey's locksmiths work on master keying systems in that they "either furnish new cylinders and master key them or order them maybe from a factory master key and either supply them or supply and install them" (Tr. 842). He had a basic understanding of what re-pinning a cylinder meant, and testified that Abbey's locksmiths re-pinned cylinders, and performed work associated with panic bars (Tr. 842-43). However, only about ten percent of Abbey's work is devoted to the creation of master keying systems. Its locksmiths spend most of their time replacing locks and cylinders, repairing and replacing doors, changing hinges, and upgrading residential hardware such as door knobs and dead bolts. He acknowledged that a locksmith license is not required for repairing and/or replacing doors (Tr. 840-42, 846-52). Mr. Geffner was unsure what key card access meant (Tr. 843).

East Coast Locksmiths

Gary Schoeppler is a locksmith employee with East Coast Locksmiths ("ECL") in the Bronx. As the sole locksmith employee at ECL, Mr. Schoeppler maintained that he is regularly engaged in resolving automobile lock-outs, residential lock-outs, gate installations, installation of new locks with pre-pinned cylinders, and changing locks (Tr. 752, 780-81). He also testified that he has done small locksmithing jobs for HRA (Tr. 754-55). The work included replacing broken locks, re-keying cylinders, and on the rare occasion, creating a master key system. While he testified that he has worked on panic bars, the nature of the work was unclear. Mr. Schoeppler testified that his work did not involve swipe or proximity cards (Tr. 780).

ANALYSIS

As a preliminary matter I find that while the Comptroller's investigation was flawed, it does not require that the matter be remanded for further investigation as suggested by the City. First, the Comptroller is not required to have OLR at its meetings or site visits. *See Office of the Comptroller ex. rel Local 621 v. Office of Labor Relations*, OATH Index No. 1398/97 at 13 (Nov. 5, 1997), *adopted in full*, Comptroller's Order and Determination (Apr. 1, 1998), Commissioner's Supplemental Order and Determination (Apr. 29, 1998) *aff'd*, 253 A.D.2d 596 (1st Dep't 1998). In any event Mr. Kinach credibly testified that OLR was invited to provide input regarding sites for the Comptroller to visit, but that he was either ignored or told that it was his responsibility (Tr. 135-36, 191-92, 615).

Regarding its sufficiency challenge, OLR cited to *Flannery v. Joseph*, 300 N.Y. 149 (1949), for the proposition that the Comptroller must demonstrate that it undertook a complete investigation to ascertain the relevant facts. In *Flannery*, the court articulated that "[t]he burden of investigation lies with the comptroller in the first instance . . . and his determination should be made upon the facts." This does not mean that the quality of the Comptroller's investigation is based on the number of site visits that it made. Undoubtedly, the number of visits made by the Comptroller's investigators to City sites was low. Further, its investigation of institutional locksmiths was skeletal, at best.³ However, I found that the City locksmiths who testified provided evidence that adequately supplemented the Comptroller's investigation and supported its findings with respect to the work undertaken by them.

Turning to which of the proposed groups is the best match for complainants, Labor Law 220(3) requires that workers employed on public works be paid the prevailing rate of wages. The prevailing rate is defined as:

[T]he rate of wage paid in the locality . . . by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.

Labor Law § 220(5)(a). The "locality" is defined as:

³ The Comptroller's preliminary notes indicates that NYU is one of the largest employers of private sector locksmiths (Resp. Ex. 19). However, there was no testimony that NYU was visited.

[S]uch areas of the state described and defined for a trade or occupation in the current collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public and private work.

Labor Law § 220(5)(d). The locality, New York City, is not in dispute.

The issue here is whether the record supports a finding that locksmiths and supervising locksmiths are comparable to Columbia's locksmiths or to one of the other groups presented. If yes, those groups must be identified as the prevailing groups for purposes of rate-setting. *See Austin v. City of New York*, 258 N.Y. 113, 117 (1932); *see also Kelly v. Beame*, 15 N.Y.2d 103, 110 (noting the statute's "basic underlying policy" that "persons who are employed on public works should receive the prevailing rate of wage that those doing the same work on non-public works receive").

"Comparability does not require that the nature of the business performed by the private employer and the municipal employer be identical. Even workers employed in different fields can be working in a comparable trade or occupation if the actual work performed is similar." *See Office of the Comptroller, ex rel. Local 1320 v. Office of Labor Relations*, OATH Index No. 1522/09 at 14 (Sept. 10, 2009), citing *Watson v. McGoldrick*, 286 N.Y. 47, 53-55 (1941). "Blind insistence on identifying the exact same trade or occupation in the private sector where none exists would impermissibly thwart the statutory purpose." *Local 1320*, OATH 1522/09 at 14, citing *Austin*, 258 N.Y. at 117; *see also Office of the Comptroller, ex rel. Local 1087 v. Office of Labor Relations*, OATH Index No. 2451/08 (Apr. 6, 2009), *adopted in full*, Comptroller's Order and Determination (June 26, 2009) (similarities in the type of work performed by the maintenance engineers and radio repair mechanics, and the skill sets needed to repair, maintain, and install the various electronics communications equipment found sufficient to support a finding that the two jobs are comparable).

As a legal matter, the "actual work" performed by the two groups of workers being compared controls. *See Flannery*, 300 N.Y. at 154 (the "critical" factor, in determining whether private employees are in the same trade or occupation as publicly employed workers, is whether "their work differs substantially"); *Kelly*, 15 N.Y.2d at 110 (prevailing wages must be fixed "based on the work actually performed"). Thus, the distinction between institutional and retail locksmiths that the Comptroller advanced becomes attenuated, and is at best nominal only, if their duties are substantially the same or equivalent. "[I]n construing [Labor Law § 220] the

courts have recognized that a comparison may be made to similarly employed workers Permitting a comparison to be made to similarly situated workers is necessary (to effectuate) the “statutory purpose.” See *BA-CEE Div. of Local Union No. 3, IBEW, AFL-CIO v. Office of Labor Relations*, OATH Index No. 230/92 at 51-52 (Apr. 15, 1992), citing to *Flannery v. Joseph*, 300 N.Y. 149 (1949).

At the hearing, competent evidence was adduced on Columbia, an institution, and seven other groups: Highway, Midtown, Triple AAA, Central, Paragon, Abbey, and ECL. The question is which, if any, of these groups is comparable to complainants.

I found the duties of Columbia’s head locksmith and locksmith A to be comparable to the duties of the City’s supervising locksmith and locksmith, respectively.

While the job duties of the City’s supervising locksmith and Columbia’s head locksmith are not identical, neither are they identical across the board with all the City’s supervising locksmiths. The differences appear largely attributable to the type of facility where each supervising locksmith works. In fact, of all the City’s supervising locksmiths, Mr. Kenny appears to assume the most responsibility. The job description for the head locksmith provides for supervisory duties, not only of the locksmiths who are accountable to him, but of the locksmith shop in the absence of the foreman or assistant foreman. Moreover, the credible evidence indicates that Columbia’s head locksmith, much like the City’s supervising locksmith, is a working locksmith who supervises all locksmiths, assigns work orders, shares responsibility with the locksmith A in creating master keying systems, maintaining control of the keying system, cutting keys, and responding to emergency calls regarding lock-ins and lock-outs. Also, like the City’s supervising locksmiths, Columbia’s head locksmith conducts site surveys, reviews floor plans and schedules hardware, when developing a master keying system. To the extent that the job description for the head locksmith provides for more carpentry experience than locksmithing, neither Mr. Di Palma nor Mr. Schlosser testified that carpentry is a significant part of the head locksmith’s duties. Thus, I perceive no substantial differences between the duties of Columbia’s head locksmith and the City’s supervising locksmith, and find their jobs to be comparable.

Turning to the selection of a title comparable to the City locksmith, the evidence supports a finding that the locksmith A is comparable to the City locksmith because of the similarity of duties and equipment. In addition to creating master keying systems, the locksmith A, like the

City locksmith, performs all assignments from the head locksmith, including new installations and repairs, key cutting by code, pinning and re-pinning cylinders; installing hardware for electrified locking systems and exit devices such as panic bars; retrieving keys from past employees and students, and key control. Contrary to OLR's assertion that Columbia's locksmith B is a more appropriate match to the City locksmith, I found otherwise. Even though the proffered job description for the locksmith B requires more years of locksmith experience than the locksmith A, both Mr. Di Palma and Mr. Schlosser testified that the locksmith B is an apprentice who is in a "training role." Therefore, the locksmiths B title is not appropriate for comparison. *See Office of the Comptroller ex rel. Local 1320 v. Office of Labor Relations*, OATH Index No. 1522/09 at 15 (Sept. 10, 2009) (entry-level Production Worker and General Utility Worker titles were not appropriate for comparison because they were training titles).

Notwithstanding my finding that Columbia's head locksmith and locksmith A are comparable matches to the City's supervising locksmith and locksmith, I also find the work of all but three of the retail locksmiths comparable to that of the City locksmiths.

As an initial matter, the locksmiths from ECL and Abbey work almost entirely on residential locksmithing, which does not involve the complexities of commercial locksmithing. Therefore, I do not find their work comparable to that of the complainants. Likewise, only 50 percent of the work done by Paragon locksmiths was commercial. Even though the commercial work that they undertook involved the same or similar duties as the complainants, it was not made clear whether some of Paragon's locksmiths were dedicated to commercial work only. Thus, as a group, I do not find the Paragon locksmiths to be a comparable match to the City locksmiths. *Cf. Local 1320*, OATH 1522/09 at 17 (even though the City's sewage treatment workers performed work similar to Con Ed's Mechanics B who were responsible for general maintenance and repairs, Mechanics B were not comparable because only one-third of the sewage treatment worker's time was spent on maintenance, whereas two-thirds of their time was spent on operations).

On the other hand, the credible testimony of the witnesses from Highway, Midtown, Triple A, and Central established that their locksmiths almost exclusively: create master key systems either by themselves or with the assistance of the manufacturer whose products they used; retain customers' codes and cut keys by code; re-pin, re-key, or change cylinders; install and maintain hardware for key card access devices; install and maintain hardware for electronic

exit devices; install, repair and maintain electronic locks; and repair and replace locks. These duties did not appear to be affected by whether or not they were profit-oriented.

At Midtown, only two locksmiths create master key systems while all seven locksmiths maintain the systems. This did not alter my finding of comparability because the credible evidence revealed that neither did all City locksmiths create master key systems. For instance, because of the high-security buildings for which DCAS is responsible, Mr. Kenny creates the master keying systems while the other DCAS locksmiths maintain them. Likewise, Folger Adams creates the master key systems for all new prisons and the DOC locksmiths are responsible for maintenance of the systems. DOC locksmiths only create master key systems “when necessary.”

The retail locksmiths also demonstrated familiarity with much of the hardware displayed in the Union’s exhibits, and testified to working with the same or similar locks and locking devices as the City locksmiths. In fact, Mr. Peterkin suggested that the retail locksmiths who engage in commercial work like Central have more experience and skills because they deal with a wider range of products and manufacturers. Thus, the distinctions between institutional and retail locksmiths advanced by the City locksmiths were undercut by the testimony of the retail locksmiths from Highway, Midtown, Triple A and Central, who derive all or much of their locksmithing business from large institutions. Because of the advances in retail locksmithing, I find the City locksmiths’ comparisons of their prior retail locksmithing to their current jobs to be outdated. Further, the Comptroller’s steadfast assertion that institutional locksmiths as a whole perform different duties from retail locksmiths was undercut by its own investigation which revealed that many of the institutional locksmiths that it visited neither had the equipment nor performed duties similar to the City locksmiths.

The only significant differences that I detected between the relevant retail locksmiths and City locksmiths were the inability by most retail locksmiths to perform audit trails and their related inability to secure the return of keys from key recipients. These functions are retained by their clients. In its closing brief, the Comptroller placed much emphasis on these differences, even though the testimony of the City locksmiths and the Comptroller’s brief support that a substantial amount of the locksmith’s time is spent in the creation and maintenance of master keying systems, not in the performance of audit trails. In fact, the testimony did not reveal the regularity with which audit trails are performed. Moreover, this is not a duty that is uniform

across agencies, as confirmed by Mr. Kenny (Tr. 408). Accordingly, I am not persuaded that the “security” functions that the Comptroller attributed to the City locksmith based on the record-keeping and audit trail functions constituted “substantial” differences as claimed. *See Flannery v. Joseph*, 300 N.Y. 149, 154 (1949).

In sum, I find the duties of the locksmiths at Highway, Midtown, Triple A and Central to also be comparable to the City locksmiths’. However, of the four, I only find the duties of two supervisors, Mr. Liebowitz of Highway and Mr. Czajkowski of Midtown, both of whom are working locksmiths, to be comparable to the City’s supervising locksmiths. The duties of Mr. Peterkin and the co-owner of Central are not comparable because they focus mainly on administrative duties and rarely perform any locksmithing work. Likewise, even though Mr. Brown convincingly articulated the duties of his locksmiths, he is not a licensed locksmith and functions as an administrator only.

I turn now to the issue whether the thirty percent threshold required by section 220(5)(a) of the Labor Law has been met. Under section 220(5)(a), the prevailing rate is that rate of wage paid in the locality as a result of collective bargaining agreements between bona fide labor organizations and private sector employers performing public or private work “provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed.”

The following chart illustrates my findings in terms of the number of private sector locksmiths and supervising locksmiths who perform work comparable to City locksmiths and supervising locksmiths. I note that my calculations are based on the number of employees in the private sector groups at the time of trial because the retail locksmiths testified that their employee numbers fluctuated during the relevant period.

TABLE OF LOCKSMITHS & SUPERVISING LOCKSMITHS PERFORMING WORK COMPARABLE TO CITY LOCKSMITHS & SUPERVISING LOCKSMITHS		
Private Sector Firm or Institution	No. of Supervising Locksmiths	No. of Locksmiths
Columbia University	2	8
Highway Locksmiths	1	7
Midtown Security	1	6
AAA Architectural Hardware		9
Central Lock & Security Systems		4
TOTALS	4	34

Because I found the actual work performed by Columbia's locksmiths and the locksmiths from four retail locksmith shops to be comparable to that performed by City locksmiths, any calculation to determine whether the Comptroller's selection satisfies the statutory thirty percent threshold must factor in both Columbia's locksmiths and the respective retail locksmiths.

As the above chart illustrates, the universe of supervising locksmiths whose duties I find comparable to the City's supervising locksmiths totals four. That includes the head locksmiths at Columbia (2) and the supervising locksmiths at Highway (1) and Midtown (1). Columbia's head locksmiths are the only locksmiths who receive a collectively bargained rate of wage. They also comprise fifty percent of the universe of supervising locksmiths. Therefore, the statutory requirement has been met, in that, Columbia employs at least thirty percent of workers in the same trade or occupation as the City's supervising locksmiths. Accordingly, the wages and supplements set forth in Columbia's collective bargaining agreement for its head locksmith should be deemed prevailing for the City's supervising locksmiths.

With regard to locksmiths who perform work comparable to City locksmiths, their number totals thirty-four. They include the locksmiths A from Columbia (8), Highway (7), Midtown (6), Triple A (9), and Central (4). Of the thirty-four locksmiths, Columbia's eight locksmiths A are covered by Columbia's collective bargaining agreement with Transport Workers Union of America Local Union No. 241, and Central's four employee locksmiths are covered by the collective bargaining agreement between Central and Amalgamated Clothing Workers Local Union No. 348. In all, 12 of the 34 workers receive a collectively bargained rate of wage. The remaining 22 workers do not. Thirty percent of 34 workers equal 10.2. While independently neither Columbia's bargaining agreement nor Central's meets the thirty percent threshold, collectively they do.

In *BA-CEE Div. of Local Union No. 3, IBEW, AFL-CIO v. Office of Labor Relations*, OATH Index No. 230/92 at 69-72 (Apr. 15, 1992), Administrative Law Judge Faye Lewis noted that section 220(5)(a) defines a single prevailing "rate" and specifically uses the plural terms "agreements" between "employers" of the private sector provided that those employers employ at least thirty percent of workers in the same trade. The statutory language therefore permits consideration of multiple collective bargaining agreements in arriving at a prevailing rate. Accordingly, the collective bargaining agreements with Local 241 for Columbia's locksmiths and Local 348, for Central's locksmiths may be combined to reach the thirty percent threshold.

Thus, the only remaining question is which collectively bargained wage should apply.

Section 220(5) of the Labor Law does not specifically state the procedure to be followed to determine the prevailing rate of wage where two or more collectively bargained agreements are involved. In *New York Telephone Co. v. New York State Dep't of Labor*, 272 A.D.2d 741, 744 (3rd Dep't 2000), the Third Department noted that "Labor Law § 220 is silent as to the means of determining which prevailing wage rate should apply where . . . the trade in question is covered by more than one collective bargaining agreement." *Id.*

However, in cases involving two or more collective bargaining agreements that independently cover thirty percent of workers in the same trade in the locality, courts have favored the predominant union. See *International Union of Elevator Constructors Local No. 1, AFL-CIO v. Thompson*, 22 Misc.3d 1136A, 881 N.Y.S.2d 363 (Sup. Ct. N.Y. Co. 2009) ("Elevator Constructors"); *BA-CEE Div. of Local Union No. 3, IBEW, AFL-CIO v. Office of Labor Relations*, OATH Index No. 230/92 (Apr. 15, 1992). In the *Elevator Constructors* case, elevator repair and maintenance workers were represented by two different unions. One union challenged the Comptroller's selection of the other's collective bargaining agreement as prevailing. Both unions independently covered more than thirty percent of the workers. Citing to the *New York Telephone Co.* case, the Supreme Court framed the issue as one of determining which of the two unions was predominant, and articulated that "[u]nder the definition of "prevail" or "prevailing"...it stands to reason that when a trade is represented by more than one union...the rate should be set by using the rate set forth in the [collective bargaining agreement] of the union that has the most members employed in that trade within New York City." *Id.*

The same rationale should apply here. Since Columbia's collective bargaining agreement with Local 241 covers twice as many locksmiths as Central's collective bargaining agreement with Local 348, it is predominant.

Accordingly, I find that the wages and supplements set forth in the predominant collective bargaining agreement, that is, Columbia's collective bargaining agreement with Local 241 for its locksmiths A, should be deemed prevailing for the City's locksmiths.

RECOMMENDATION

In keeping with my findings, I recommend that the Comptroller's preliminary determination that City locksmiths and supervising locksmiths be paid commensurate with the

wages and supplements set forth in Columbia's collective bargaining agreement for its locksmiths with Local 241, be adopted.

Ingrid M. Addison
Administrative Law Judge

June 23, 2010

SUBMITTED TO:

JOHN LIU
Comptroller

APPEARANCES:

CONSTANTINE P. KOKKORIS, ESQ.
Attorney for Petitioner, Office of the Comptroller
SCHWARTZ, LICHTEN & BRIGHT, P.C.
Attorneys for Complainant, Local 1087
BY: DANIEL R. BRIGHT, ESQ.

STEVEN E. SYKES, ESQ.
Attorney for Complainant, District Council 37, AFSCME, AFL-CIO

MAYRA E. BELL, ESQ.
DESIREE BUSCHING
Attorneys for Respondent, Office of Labor Relations

NYC Office of the Comptroller's Interim Order and Determination (Oct. 28, 2010)

**COMPTROLLER EX REL. LOCAL 1087,
DISTRICT COUNCIL 37, AFSCME, AFL-CIO**
Petitioner
-against-
OFFICE OF LABOR RELATIONS
Respondent

KAREN S. COHEN, *Assistant Comptroller*

Order and Determination

Whereas:

This proceeding was brought by the Comptroller's Bureau of Labor Law ("Bureau") pursuant to New York State Labor Law §220(8-d) in response to complaints filed by Local 1087, an affiliate of District Council 37 AFSCME, AFL-CIO (the "Union"), to fix the prevailing rate of wages and supplements for employees of the City of New York serving in the titles of Locksmith and Supervisor Locksmith, during the period July 1, 2002 through March 31, 2008. The Office of Labor Relations ("OLR") represented the City of New York.

Honorable Ingrid M. Addison, Administrative Law Judge ("ALJ Addison") of the Office of Administrative Trials and Hearings ("OATH"), conducted fact-finding hearings between January and February 2010. The Union, OLR and the Bureau submitted post-hearing memoranda of law and ALJ Addison issued a Report and Recommendation on June 23, 2010.

After reviewing the ALJ Addison's Report and Recommendation, the transcript of the hearings, the exhibits thereto, and the post-hearing memoranda of law, pursuant to the powers and duties vested in me by the Comptroller under Labor Law §220 et seq., I make the following *Interim Order and Determination*, adopting in part and remanding in part the *Report and Recommendation*, which is incorporated by reference herein.

It is hereby Ordered and Determined that:

1. The prevailing rate of wage and supplements for Supervisor Locksmith (Code No. 90763) during the period July 1, 2002 through March 31, 2008, are those of the Building Contractors' Association, Inc. ("BCASS") and the Transport Workers Union of America Local Union No. 241 ("Local 241") for the head locksmith at Columbia University.

2. For the period July 1, 2002 through March 31, 2008, the City of New York shall pay city employees serving in the title Supervisor Locksmith wages and supplements commensurate with those contained in the Collective Bargaining Agreements of BCASS and Local 241 (Pet. Ex. 6a and 6b covering the period 2001-2005, and 2005-2008, respectively) and summarized in the "Summary of Prevailing Wages and Benefits" for Supervisor Locksmith attached to the August 25, 2009 petition filed by William C. Thompson, Comptroller (ALJ Ex. 1) (attached hereto as "Schedule A").

3. Less than 30% of locksmiths received a common, collectively bargained rate of wage; therefore, in accordance with Labor Law §220(5-a) the prevailing rate for city employees serving in the title Locksmith shall be the average rate paid to the locksmiths OATH found comparable to the city employed locksmiths.

4. For the period July 1, 2002 through March 31, 2008, the City of New York shall compensate Locksmiths (Code No. 90723) commensurate with the average wages and supplements received by the 34 locksmiths variously employed by Columbia University, Highway Locksmiths, Midtown Security, AAA Architectural Hardware, and Central Lock & Security Systems,

5. *The matter is remanded to OATH for the following purposes:*

- establishing the value of wages and supplements Columbia University paid its head locksmith pursuant to the Local 241 agreement during the period July 1, 2002 through March 31, 2008; and,
- determining the average rate of wage and supplements for locksmiths pursuant to Labor

Law § 220(5-a) during the period July 1, 2002 through March 31, 2008.

The Bureau will offer competent evidence as to the wages and supplements Columbia University pays its head locksmith and locksmiths and OLR will provide similar evidence for locksmiths employed at Highway Locksmiths, Midtown Security, AAA Architectural Hardware, and Central Lock & Security Systems.

Discussion:

Although I have adopted the ALJ Addison's Report and Recommendation for Supervisor Locksmith in full, I reach a different conclusion for employees working in the title of Locksmith. In determining the applicable rate, the law encourages reference to collective bargaining agreements:

The prevailing rate of wage for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed, §220(5)(a).

Predictably, the Comptroller frequently ties prevailing rates to preponderant bargaining agreements that meet the above criteria. In return, the law confers on fiscal officers a rebuttable presumption of reasonableness and then affords employers charged with violating the law, an opportunity to contest our wage determinations by presenting competent evidence that the actual percentage of workers in receipt of the *collectively bargained rate* is below the minimum 30% threshold. (See, *Supervisors of Mechanics, Mechanical Engineers*, OATH Index No. 1398/97, *aff'd*, 253 A.D.2d 596 [1st Dep't 1998], citing, *Joint Industry Board v. Schaffer*, 205 A.D.2d 310 [1st Dep't 1994] and *Liquid Asphalt Distributors Association, Inc. v. Roberts*, 116 A.D.2d 295 [3rd Dep't 1986]).

During its investigation of the Union's complaint, the Bureau focused entirely on

institutional employment. Theorizing that institutional employees have a stake in the maintenance of their facility similar to city employed locksmiths, the Bureau limited its review of the private sector to in-house employment only, I find the Bureau's approach too narrow.

Typically, when determining a trade classification "[t]he pivotal question is the nature of the work performed" (*Kelly v Beam*, 15 NY2d 103, 109 [1965]). By limiting its inquiry to institutional employment, the Bureau failed to consider the wage and benefits data of other available categories of employment. Focusing on the incongruity, OLR established to the satisfaction of ALJ Addison that the work performed in-house by Columbia's locksmiths is not significantly different from commercial work performed by independent locksmith businesses, and as consequence, Columbia's Local 241 locksmiths constituted less than 30% of area locksmiths found comparable by OATH.

While I agree with the ALJ Addison's findings on these two points, I disagree that we can attain the 30% threshold by including the membership of unrelated unions (i.e., Amalgamated Clothing Workers Local Union No. 348). Such a radical departure from past practice may stem from the 1983 amendment to the definition of the "prevailing rate of wage" (Labor Law §220[5-a]). The new definition added references to collective bargaining agreements and reduced the prevailing rate threshold from 40% to 30%, apparently caused confusion. Fortunately, case law is instructive: "it is the employer contesting a prevailing wage rate who bears the burden of demonstrating that less than 30% of the workers in a locality are subject to that wage. (See, *Lantry v. State of New York*, 12 A.D.3d 864, 866 [3d Dep't 2004] *affd*, 6 N.Y.3d 49 [2005]). Moreover, in *Liquid Asphalt Distributors Association Inc. v. Roberts*, 116 A.D.2d 295, 298 (3d Dep't 1986), the court observed that "in conjunction with abolishing respondent's duty to survey, the 1983 amendments place the burden on employers who contest prevailing wage rates to show that, in fact, less than 30% of the workers in a given locality are subject to the wage rate adopted."

In fact, OATH addressed the 30% issue in the past finding that legislative history supports the Bureau's view that the law favors utilizing a single collective bargained rate to the extent the bargaining agreement covers 30% of the workers in a particular title. (See,

Comptroller v. Office of Labor Relations, Stationary Engineers Electric, OATH Index No. 230/92 [Apr. 15, 1992] at 70 to 71, [citing Governor's Bill Jacket to Assembly Bill No. 2043-A 1983 N.Y. Law Ch. 447]).

KAREN S. COHEN, *Assistant Comptroller*, NYC Office of the Comptroller